



LEGAL

Wills & Estate Lawyers

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Planning ahead?

While no one expects to lose the capacity to manage their own affairs, many people feel comfort from knowing that they have planned ahead and made arrangements for a trusted relative or friend to make decisions on their behalf if something does happen.

A first step in planning ahead involves talking to significant people in your life to communicate your wishes to them. A second step involves identifying a suitable person whom you trust to act for you. A third step is to decide whether you need to make any formal arrangements, or whether your trusted friends and family could make the decisions you would want to make, if you lose capacity yourself.

You should be aware, however, that there are some situations, which require legal authority for someone to act on your behalf if you do not have the capacity yourself: for example, accessing your bank account to pay your bills, updating your investments, or in some circumstances, consenting to medical treatment.

What is a power of attorney?

A 'power of attorney' is a document you can sign to appoint another person (called your attorney) to act for you in relation to financial affairs. The document states what the attorney is authorised to do. This can be quite narrow and specific, or as general as you wish. Any lawful action taken by the attorney under the power of attorney is binding on you, so it is important to appoint someone you can trust.

When the power of attorney is signed, the document can be given to the attorney, or you can hold onto it until the need arises. When it is provided to your attorney, it can be used to prove that he or she is authorised to act on your behalf. Even though you have appointed an attorney, you can still personally carry out any transactions, such as banking and the sale of property, while you retain the ability to do so.

How long does a power of attorney last?

A power of attorney continues as long as you want it to, and it can be cancelled at any time while you have the capacity to make the decision. It can also last for a set period of time, for example while you are ill or while you are overseas. By law, a power of attorney ceases to operate if you lose the ability to make decisions or when you die.

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What happens if I lose the capacity to make decisions?

If, at the time of giving the power of attorney, you want the authority you give the attorney to continue even if you lose the capacity to make your own decisions, you need to sign a document called an 'enduring power of attorney'.

An enduring power of attorney differs from a general power of attorney in that:

The intention for the enduring power of attorney to continue is stated in the document.

Your attorneys must accept the appointment before the power of attorney can come into effect.

Your signature on the document is witnessed by a person such as a solicitor, barrister or Local Court Registrar. The witness cannot be the person you propose to act as your 'enduring attorney'.

The person witnessing your signature must also complete a certificate about your understanding.

Making an enduring power of attorney is a way for you to legally appoint a person of your choosing to manage your financial affairs even if you later lose capacity to make these decisions for yourself.

When can an enduring power of attorney be given?

An enduring power of attorney must be made when you are of sound mind. It is too late to appoint an attorney after you have lost the capacity to manage your own affairs.

You can make enduring power of attorney arrangements that come into effect immediately, or that remain 'dormant', and only come into effect in particular circumstances. For example, you could decide to complete an enduring power of attorney that becomes active only when you are unable to manage financial matters for yourself.

Who can I appoint as my attorney?

The person you appoint should be someone you trust. He or she must be 18 years or over.

If you have no one like this or they are too busy or do not have the required skills, the **Public Trustee NSW** or private trustee companies can be appointed as your attorney. They will charge a service fee for handling your affairs.

Your attorney must sign the enduring power of attorney form to show that he or she consents to act, so before filling in the form you need to ask the person you choose as your attorney if they agree to be appointed. The attorney can sign the form at the same time as you or at a later time, but it will not start to operate until he or she signs it.

Can an attorney look after my real estate interests?

If you want your attorney to be able to sell or deal with real estate on your behalf, the power of attorney must be registered with the **Department of Land and Property Information**. It is also a good idea to register the power of attorney if you want your attorney to be able to sell or deal with shares on your behalf, as some brokers or companies may require this, even though the law does not.

Can an attorney use my money for gifts?

The current form on which a power of attorney is made requires you to decide the powers you want your attorney to have to use your money for the attorney's benefit, for the benefit of other people or to make gifts.

An attorney cannot give away your money or property unless the power of attorney form specifically allows the attorney to do so.

As with gifts, an attorney cannot use your money for his or her own benefit, or the benefit of any other person, unless the power of attorney form specifically allows the attorney to do so.

What is an enduring guardian?

An enduring guardian is someone you appoint, at a time when you have capacity, to make personal, health or lifestyle decisions on your behalf should you lose the capacity to make them for yourself.

You can appoint more than one enduring guardian if you wish, and you should choose which decision-making areas you want your enduring guardian to have. These are called functions. You can give your enduring guardian as many or as few functions as you like. For example, you can authorise your enduring guardian to decide such things as where you may need to live or what medical treatment you should receive.

Your enduring guardian must act within the principles of the *Guardianship Act*, in your best interests and within the law. You cannot give your guardian a function or a direction that would involve them in an unlawful act, such as euthanasia.

How can a solicitor help me?

Your solicitor can:

- Tell you more about how a power of attorney or the appointment of an enduring guardian can be used to help organise your financial and personal affairs should you lose the ability to manage them yourself;

- Prepare and explain the documents for the power of attorney and appointment of enduring guardian, and arrange the necessary signatures and certificates.

For a free chat as to how a cost effective Power of Attorney can give you and your loved ones peace of mind, contact **Greg Smith** at GHS Legal

Ph: 02 9262 5877 or toll free 1300 132 242